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BENJAMIN WILLIAM HAWKES v. PP

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
ABANG ISKANDAR CJ (SABAH & SARAWAK)
B NALLINI PATHMANATHAN FCJ
VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
ZALEHA YUSOF FCJ
ZABARIAH MOHD YUSOF FCJ
C HASNAH MOHAMMED HASHIM FCJ
[CRIMINAL APPEAL NO: 05-214-09-2017(K)]
13 AUGUST 2020
[2020] CLJ JT(9)

D ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Conviction and sentence – Appeal against – Failure by prosecution during trial to adduce CCTV footage – Whether fatal to prosecution's case – Whether prosecution in breach of s. 51A(1)(b) of Criminal Procedure Code ('CPC') – Whether court obliged to construe word 'shall' in s. 51A(1) as mandatory – Whether CCTV*
E *footage fell within ambit of 'documents' as envisaged under s. 51A(1)(b) – Whether prosecution withheld or suppressed evidence of CCTV footage – Whether adverse inference under s. 114(g) of Evidence Act 1950 ought to be invoked – Whether non-disclosure of CCTV footage infringed principle of right to fair trial – Whether conviction and sentence ought to be upheld – Dangerous Drugs Act 1952, s. 37(da)*

F ***CRIMINAL PROCEDURE:*** *Disclosure of information – Trial – Trafficking in dangerous drugs – Failure by prosecution during trial to adduce CCTV footage – Whether fatal to prosecution's case – Whether prosecution in breach of s. 51A(1)(b) of Criminal Procedure Code ('CPC') – Whether court obliged to construe word 'shall' in s. 51A(1) as mandatory – Whether CCTV footage fell within ambit of*
G *'documents' as envisaged under s. 51A(1)(b) – Whether prosecution withheld or suppressed evidence of CCTV footage – Whether adverse inference under s. 114(g) of Evidence Act 1950 ought to be invoked – Whether non-disclosure of CCTV footage infringed principle of right to fair trial*

WORDS & PHRASES: *'shall'– Criminal Procedure Code, s. 51A(1) – Intention of*
H *Legislature – Whether mandatory or directory – Whether word 'shall' would by itself make a provision of Act mandatory – Whether word 'shall' must be construed to enable and assist administration of justice and not impede it – Whether liberal meaning or rigid interpretation ought to be given*

The appellant, a South African national, was charged with trafficking in
I dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). On 21 July, at around 8pm, the appellant landed at the Langkawi International Airport from Johannesburg *via* Singapore. The appellant cleared the immigration checkpoint and proceeded to claim his

trolley bag ('P8') at the baggage carousel when the customs officer, PW4, requested that the appellant open P8. In doing so, a black document bag ('P22') was revealed. While P22 was scanned, the appellant walked away towards the airport exit leaving his passport, boarding pass and two handphones at the table by the scanner machine. Several officers from the enforcement division of the customs department later arrived at the airport, by which time, the appellant had been apprehended and was in handcuffs. A further search on the bag and P22 was done in the presence of the appellant, leading to the discovery of two black rectangle packets (P58A and P58B) in the side walls of P22 which contained crystal substances, confirmed to be 804.6 and 793.7g of methamphetamine. The investigating officer, PW9, obtained the relevant CCTV footage from Malaysia Airport Berhad ('MAB') but the said footage was not tendered in court during the trial nor disclosed to the defence. In his unsworn statement, the appellant said on the material date he had informed the customs officer that he wished to go and get his friend, Jimmy, who was supposedly waiting for him outside the airport building. After the appellant went out to get his friend, who could not be located, the appellant returned with PW5, the security officer, where he was later handcuffed. The appellant denied that the drugs in the document bag were his and claimed he had no knowledge of the drugs.

The case went for full trial and the Judicial Commissioner ('JC') held that the prosecution had proved a *prima facie* case against the appellant. The JC found that the appellant was in actual possession of the drugs and relied on the presumption under s. 37(da) of the DDA for trafficking. The Court of Appeal affirmed the decision of the JC. Dissatisfied, the appellant appealed to the Federal Court.

The appellant raised only one issue as his bone of contention in this appeal, namely, on the failure by the prosecution to adduce the CCTV footage outside the airport building, which he submitted was fatal to the prosecution's case. The appellant's appeal on the issue of constitutionality of the imposition of the death sentence was dealt with in a separate judgment (please refer to *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147). The appellant contended that both the High Court and the Court of Appeal had erred in failing to find that the prosecution was in breach of s. 51A(1)(b) of the Criminal Procedure Code ('CPC') when it failed to disclose or produce the relevant CCTV footage, recording the events at the airport. As a result, the appellant's right to a fair trial had been denied. The issues that arose were (i) whether the court was obliged to construe the word 'shall' in s. 51A(1) of the CPC as mandatory; (ii) whether the non-disclosure of the CCTV footage infringed the principle of right to a fair trial; and (iii) the ambit of the duty of disclosure by the prosecution under s. 51A(1)(b) of the CPC.

Held (dismissing appeal)
Per Zabariah Mohd Yusof FCJ delivering the judgment of the court:

(1) Section 51A of the CPC provides 'The prosecution shall before the commencement of the trial deliver to the accused the following documents ...' Whether the word 'shall' in a particular legislation is mandatory or directory depends upon the intention of the Legislature in question which is ascertained by looking at the whole scope of the statute to be construed. The use of the word 'shall' would not by itself make a provision of the Act mandatory. The concern of s. 51A of the CPC appears to be with the service and delivery of documents and not with admissibility of evidence. Such being the case, the word 'shall' must be construed, in all circumstances of the case, to enable and to assist in the administration of justice rather than to impede it. To construe the word 'shall' as mandatory in this case would be absurd, as the non-compliance with s. 51A of the CPC would vitiate a trial and would result in allowing a guilty person to be set free. Hence, a more liberal meaning must be given to the word 'shall' in s. 51A of the CPC rather than a rigid interpretation, so as not to curtail the administration of justice in the manner of a case to be carried out. (paras 40, 46, 54 & 55)

(2) Section 51A(1)(b) of the CPC provides that 'The prosecution shall before the commencement of the trial deliver to the accused … a copy of any document which would be tendered as part of the evidence for the prosecution; and …'. The CCTV footage was never tendered as the prosecution's exhibit as forming part of the prosecution's case because the footage was not clear and would be of no assistance to the prosecution's case. Hence, the CCTV footage had never been intended to be part of the prosecution's exhibits or evidence, and thus, there was no duty on the part of the prosecution to deliver such CCTV footage to the appellant before the commencement of the trial under s. 51A(1)(b) of the CPC. (paras 57 & 58)

(3) There was no basis to say that the prosecution had withheld or suppressed the evidence of the CCTV footage because (i) there was no dispute or challenge on the evidence of PW9 that the CCTV footage was unclear, and as such, this evidence was deemed accepted; and (ii) there was also no suggestion by the appellant to PW9 that any exculpatory and material evidences which were favourable to the defence of the appellant were withheld or suppressed by the prosecution in this CCTV footage by the prosecution. Thus, adverse inference under s. 114(g) of the Evidence Act 1950 could not be invoked against the prosecution. (para 61)

(4) Section 51A of the CPC expressly provides for the disclosure of First Information Report, documents or reports which the prosecution intends to tender at trial and the statement of fact favourable to the defence only,

subject to public interest exception. It is an automatic disclosure by the prosecution only to these three types of 'documents' as compared to s. 51 of the CPC which provides the discovery upon request. Hence, the CCTV footage did not fall within the ambit of 'documents' as envisaged under s. 51A(1)(b) of the CPC. (para 66)

(5) The non-compliance with s. 51A of the CPC would not statutorily prevent the prosecution from tendering the documents which were not delivered to the accused person before trial as evidence in the course of the trial. Hence, it is only procedural and not evidential. It is trite law that even in cases of evidence obtained illegally, its admissibility is unaffected as the issue is actually relevancy. (para 67)

(6) There was no merit in the contention of the appellant that the failure of the prosecution to disclose the CCTV footage had caused irreparable prejudice to the appellant and had denied the appellant's right to a fair trial which is a fundamental right under cl. (1) of art. 5 and cl. (1) of art. 8 of the Federal Constitution. There was thus no appealable error shown by the appellant as to the decision of the JC which was affirmed by the Court of Appeal warranting this court's intervention. This court therefore affirmed the conviction and sentence under s. 39B of the DDA. (paras 73 & 75)

Bahasa Melayu *Headnotes*

Perayu, seorang warganegara Afrika Selatan, dituduh mengedar dadah berbahaya, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada 21 Julai, pada pukul 8 malam, perayu mendarat di Lapangan Terbang Antarabangsa Langkawi dari Johannesburg melalui Singapura. Perayu melepasi pusat pemeriksaan imigresen dan terus menuntut beg troli miliknya ('P8') di karousel bagasi di lapangan terbang apabila pegawai kastam, PW4, meminta perayu membuka P8. Dalam berbuat demikian, satu beg dokumen hitam ('P22') didedahkan. Semasa P22 diimbas, perayu telah berjalan ke arah jalan keluar lapangan terbang dan meninggalkan paspot, pas masuk dan dua telefon bimbit di atas meja berdekatan mesin pengimbas. Beberapa pegawai dari bahagian penguatkuasaan kemudiannya tiba di lapangan terbang dan pada masa itu perayu telah ditangkap dan digari. Pencarian lanjut atas beg dan P22 dilaksanakan dalam kehadiran perayu, dan dua paket segi empat tepat hitam (P58A dan P58B) dijumpai pada dinding sisi P22 yang mengandungi bahan kristal yang disahkan 804.6 dan 793.7g methamphetamine. Pegawai penyiasat, PW9, memperoleh rakaman CCTV berkaitan daripada Malaysia Airport Berhad ('MAB') tetapi rakaman itu tidak dikemukakan di mahkamah semasa perbicaraan atau didedahkan kepada pembelaan. Dalam pernyataan tidak bersumpahnya, perayu menyatakan pada tarikh tersebut, dia telah memaklumkan pada pegawai kastam bahawa dia ingin mencari kawannya, Jimmy, yang dikatakan sedang menunggunya di luar bangunan lapangan terbang. Selepas

perayu keluar mencari kawannya, yang tidak dapat dijumpai, perayu kembali dengan PW5, pegawai sekuriti, dan dia telah digari. Perayu menafikan bahawa dadah-dadah yang terdapat dalam beg dokumen itu adalah kepunyaannya dan mendakwa bahawa dia tidak mempunyai pengetahuan berkenaannya.

Kes dibawa ke perbicaraan penuh dan Pesuruhjaya Kehakiman ('PK') memutuskan pendakwaan telah membuktikan kes *prima facie* terhadap perayu. Pesuruhjaya Kehakiman mendapati perayu mempunyai milikan dadah-dadah itu dan bergantung pada anggapan bawah s. 37(da) ADB untuk pengedaran. Mahkamah Rayuan mengesahkan keputusan PK. Tidak berpuas hati, perayu merayu ke Mahkamah Persekutuan.

Perayu membangkitkan hanya satu isu sebagai asas hujahannya, iaitu, kegagalan pihak pendakwaan untuk mengemukakan rakaman CCTV di luar bangunan lapangan terbang pada tarikh itu, yang dihujahkan perayu menjejaskan kes pendakwaan dan keperlembagaan hukuman mati yang dijatuhkan kepadanya. Rayuan perayu berkenaan isu perlembagaan hukuman mati telah ditangani dalam penghakiman yang berasingan (sila rujuk kepada *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147). Perayu menghujahkan kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan terkhilaf apabila gagal membuat dapatan bahawa pihak pendakwaan telah melanggar s. 51A(1)(b) Kanun Tatacara Jenayah ('KTJ') apabila gagal mendedahkan atau mengemukakan rakaman CCTV yang berkaitan, yang merekodkan kejadian di lapangan terbang. Akibatnya, hak perayu untuk mendapatkan perbicaraan adil telah dinafikan. Isu-isu yang timbul adalah (i) sama ada mahkamah mempunyai obligasi untuk mentafsirkan perkataan 'shall' dalam s. 51A(1) KTJ sebagai mandatori; (ii) sama ada dengan tidak mendedahkan rakaman CCTV, prinsip hak untuk perbicaraan adil telah dilanggar; dan (iii) lingkungan kewajipan pendedahan oleh pihak pendakwaan bawah s. 51A(1)(b) KTJ.

Diputuskan (menolak rayuan)

Oleh Zabariah Mohd Yusof HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 51A KTJ memperuntukkan 'The prosecution shall before the commencement of the trial deliver to the accused the following documents …'. Sama ada perkataan 'shall' dalam sesuatu perundangan adalah mandatori atau direktori bergantung kepada niat Badan Perundangan dengan melihat pada keseluruhan skop statut untuk ditafsirkan. Perkataan 'shall' tidak akan menjadikan peruntukan Akta dengan sendirinya sebagai mandatori. Seksyen 51A KTJ hanya untuk tujuan penyerahan dan penyampaian dokumen-dokumen dan bukan dengan kebolehterimaan bukti. Oleh itu, perkataan 'shall' harus ditafsirkan, dalam keadaan kes, untuk membolehkan dan membantu pentadbiran keadilan dan bukan menghalangnya. Untuk mentafsirkan

perkataan 'shall' sebagai mandatori dalam kes ini tidak masuk akal, kerana ketidakpatuhan s. 51A KTJ akan membatalkan perbicaraan dan akan mengakibatkan seorang yang bersalah dilepaskan dan dibebaskan. Oleh itu, maksud yang lebih liberal harus diberikan pada perkataan 'shall' dalam s. 51A KTJ dan bukannya tafsiran yang tegar, agar tidak membendung pentadbiran keadilan mengikut cara kes yang akan dijalankan.

(2) Seksyen 51A(1)(b) KTJ memperuntukkan bahawa 'The prosecution shall before the commencement of the trial deliver to the accused … a copy of any document which would be tendered as part of the evidence for the prosecution; and …'. Rakaman CCTV tidak pernah dikemukakan sebagai ekshibit pihak pendakwaan sebagai membentuk sebahagian daripada kes pendakwaan kerana rakaman tidak jelas dan tidak akan membantu kes pihak pendakwaan. Oleh itu, rakaman CCTV tidak pernah diniatkan untuk dijadikan sebahagian ekshibit-ekshibit atau keterangan pihak pendakwaan, dan dengan itu, tiada kewajipan pada pihak pendakwaan untuk menyerahkan rakaman CCTV kepada perayu sebelum permulaan perbicaraan bawah s. 51A(1)(b) KTJ.

(3) Tiada asas untuk mengatakan bahawa pihak pendakwaan menahan atau menyembunyikan keterangan rakaman CCTV kerana (i) tiada pertikaian atau cabaran ke atas keterangan PW9 bahawa rakaman CCTV tidak jelas dan dengan itu, keterangan ini dianggap diterima; dan (ii) tiada cadangan oleh perayu kepada PW9 bahawa apa-apa keterangan pengecualian atau material yang berpihak pada pembelaan telah ditahan atau ditindas oleh pihak pendakwaan dalam rakaman CCTV oleh pihak pendakwaan. Oleh itu, inferens bertentangan bawah s. 114(g) Akta Keterangan 1950 tidak boleh dibangkitkan terhadap pihak pendakwaan.

(4) Seksyen 51A KTJ jelas memperuntukkan pendedahan Laporan Maklumat Pertama, dokumen-dokumen atau laporan-laporan yang pihak pendakwaan berniat untuk mengemukakan dalam perbicaraan dan pernyataan fakta yang berpihak pada pembelaan sahaja, tertakluk kepada pengecualian kepentingan awam. Pendedahan automatik oleh pihak pendakwaan hanya pada tiga jenis 'dokumen' berbanding dengan s. 51 KTJ yang menyediakan penzahiran atas permintaan. Oleh itu, rakaman CCTV tidak terangkum dalam lingkungan 'dokumen' seperti yang dibincangkan bawah s. 51A(1)(b) KTJ.

(5) Ketidakpatuhan s. 51A KTJ tidak akan mencegah pihak pendakwaan dari segi undang-undang daripada mengemukakan dokumen-dokumen yang tidak diserahkan kepada tertuduh sebelum perbicaraan sebagai keterangan semasa perbicaraan. Oleh itu, ini hanya bersifat prosedur dan bukan keterangan. Adalah undang-undang matan bahawa dalam kes-kes di mana keterangan diperoleh secara tidak sah, kebolehterimaannya tidak terjejas kerana isu sebenarnya adalah kerelevanan.

(6) Tiada merit dalam hujahan perayu bahawa kegagalan pihak pendakwaan mendedahkan rakaman CCTV telah menyebabkan prejudis yang tidak dapat diperbaiki terhadap perayu dan telah menafikan hak perayu untuk mendapat perbicaraan adil iaitu satu hak asasi bawah kl. (1) per. 5 dan kl. (1) per. 8 Perlembagaan Persekutuan. Oleh itu, tiada kekhilafan yang boleh dirayu ditunjuk oleh perayu berkenaan keputusan PK yang telah disahkan oleh Mahkamah Rayuan, yang mewajarkan campur tangan mahkamah ini. Dengan itu, mahkamah ini mengesahkan sabitan dan hukuman bawah s. 39B ADB.

Case(s) referred to:

Cheong Seok Leng v. PP [1988] 1 LNS 39 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC ***(refd)***
Karuma v. The Queen [1955] AC 197 ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Luke Nnaemeka Ugwu lwn. PP [2016] 2 CLJ 400 CA ***(refd)***
Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim & Another Appeal [2010] 4 CLJ 331 CA ***(refd)***
PP v. Goh Thor Kiah [1952] 1 LNS 85 HC ***(refd)***
PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862 HC ***(refd)***
R v. Easterday [2003] 143 A Crim R 154 ***(refd)***
R v. H [2004] 2 AC 134 ***(refd)***
R v. Stinchcombe [1991] 3 SCR 326 ***(refd)***
Ragg v. Magistrates' Court of Victoria [2008] 179 A Crim R 568 ***(refd)***
Raphael Pura v. Insas Bhd & Ors [2003] 1 CLJ 61 FC ***(refd)***
Robert Lee & Anor v. Wong Ah Yap & Anor [2007] 4 CLJ 1 FC ***(refd)***
Rossarin Nuekaew v. PP [2017] 8 CLJ 503 FC ***(refd)***
See Kek Chuan v. PP [2013] 6 CLJ 98 CA ***(refd)***
Shabala and Others v. Attorney General of the Transvaal and Another [1996] 1 LRC 207 ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Shiv Kumar v. Hukam Chand [1999] 7 SCC 467 ***(refd)***
VK Sasikala v. State [2012] 9 SCC 771 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 51A(1)(b), (c), (3), (4), (5), 158(2), 173A, 314(2), 399, 402A, 402B, 422
Dangerous Drugs Act 1952, ss. 37(da), 39B, First Schedule
Evidence Act 1950, s. 114(g)
Federal Constitution, arts. 5(1), 8(1)
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 42 r. 12

Other source(s) referred to:

NS Bindra, *Interpretation of Statutes,* p 582

For the appellant - Gopal Sri Ram, Hisyam Abdullah, Abdul Rashid Ismail, Yasmeen Soh Sha Nisse, Karluis Quek, Azreen Ahmad Rastom, Siti Nurani Md Zahidi & Mohd Nor Hafidzuddin Yusoff; M/s Rashid Zulkifli

For the respondent - Nik Suhaimi Nik Sulaiman, Umar Saifuddin Jaafar, Mangaikarasi Krishnan, Faizah Salleh, Ku Hayati Ku Haron, Asmah Musa & Muhammad Azmi Mashud; AG's Chambers

[Editor's note: For the Court of Appeal judgment, please see Benjamin William Hawkes v. PP [2017] 1 LNS 1480 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof FCJ:

[1] This is the majority judgment of this court. The appellant, a South African national was charged as follows:

> Bahawa kamu pada 21 Julai 2013, jam lebih kurang 9.00 malam, di Balai Ketibaan, Lapangan Terbang Antarabangsa Langkawi, dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1,598.3 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The case went for full trial and the learned Judicial Commissioner ("JC") held that the prosecution had proven a *prima facie* case against the appellant. The learned JC found that the appellant was in actual possession of the drugs and relied on the presumption under s. 37(da) of the Dangerous Drugs Act 1952 ("DDA") for trafficking.

[3] The Court of Appeal affirmed the decision of the learned JC. Dissatisfied, the appellant appealed to the Federal Court. Before us the appellant raised two issues, namely the failure by the prosecution during the trial to adduce the CCTV footage outside the airport building on the material date, is fatal to the prosecution's case and the constitutionality of the death sentence imposed on him. This judgment will only deal with the first issue. The issue on the constitutionality of the death sentence will be dealt with in a separate judgment by my learned brother and sister judges, Azahar Mohamed CJ (Malaya) and Nallini Pathmanathan FCJ.

Background

[4] On 21 July 2013 around 8pm, the appellant landed at the Langkawi International Airport ('airport') from Johannesburg *via* Singapore. The appellant cleared the immigration checkpoint and proceeded to claim his trolley bag ("P8") at the baggage carousel at the airport.

[5] At the material time, PW4, customs officer was on duty operating the scanner machine at the airport. PW4 scanned P8 and the scan showed a bright orange item in it. PW4 instructed the appellant to cut open the blue plastic covering of P8 and requested that he opened P8 which had a combination lock. In doing so, the appellant removed the clothes in P8, revealing a black document bag ("P22"). P22 was scanned by the same scanning machine and this time the same bright orange item appeared on the scanner machine.

[6] While all these were going on, the appellant walked away towards the airport exit leaving his passport, boarding pass and two handphones at the table by the scanner machine.

[7] Several officers from the enforcement division of the customs department then arrived at the airport, including Mustafa al Bakri bin Wahid ("PW7"). By that time the appellant was apprehended and was in handcuffs and was sitting down.

[8] PW7 inspected P8 and found a blue plastic wrapper, some clothes and P22. After the inspection, the appellant was then brought to the enforcement office together with P8. At the enforcement office, PW7 and several other officers continued to examine P8. PW7 searched the document bag, P22 in the presence of the appellant. There was nothing inside but it was heavy. He inspected the two side walls of P22 and felt that there could be something inside it. The bag and P22 were brought to head office for further search on P22. At the head office, PW7 did a thorough search on P22 in the presence of the appellant. This search led to the discovery of two black rectangle packets ("P58A and P58B") in the side walls of P22. These two packets were found to contain crystals substances which upon preliminary testing were found to be methamphetamine. The appellant denied knowing about the impugned drugs when asked by PW7. The appellant allegedly cried when the two packets were found in P22. The items were seized, marked and photographs were duly taken.

[9] PW7 handed over the exhibits to the investigating officer, PW9 on 22 July 2013. PW9 sent P58A and P58B to the government chemist, PW3 for analysis and the results showed that the crystalline substances found in P58A and P58B were 804.6g and 793.7g of methamphetamine respectively, which is dangerous drug listed under the First Schedule of the DDA.

[10] *Vide* letter dated 22 July 2013, PW9 wrote to Malaysia Airport Bhd ("MAB") (P75), to request for the relevant CCTV footage from the airport. However, PW9 said that he had wrongly cited the wrong date when he made the request for the CCTV footage. In any event, on 25 July 2013, PW9 watched the CCTV footage at MAB's office. PW9 said in his testimony that the footage showed a white man was arrested outside the airport building, but

PW9 could not identify the white man in the footage. PW9 obtained the footage from MAB but the said footage was not tendered in court during the trial nor disclosed to the defence.

[11] It was in evidence that the appellant had tried to communicate with PW4 before the appellant left the customs inspection area but PW4 could not comprehend what the appellant was trying to say.

[12] The appellant informed PW7 that the document bag did not belong to him. PW7 was questioned on this during cross-examination.

The Defence Case

[13] In his unsworn statement, the appellant said that he went to Langkawi on holiday. He had been to Langkawi before. On the material date, the appellant arranged for a friend, Jimmy to meet him at the airport.

[14] The appellant admitted that he had a document bag inside the trolley bag which he was carrying. He said that he had not seen the trolley bag, P8 between the time when it was checked in at Johannesburg until the point when he retrieved it from the carousel at Langkawi airport.

[15] The appellant denied that the trolley bag was wrapped or covered in a blue plastic and further denied that it had a padlock. It is not clear what was the type of lock used, whether a "combination key lock" (as PW4 described it) or "padlock" (as the appellant described it), referred to the same thing. But it was asserted by the appellant that P8 has no lock at all.

[16] The appellant was asked to open his bag at the scanner machine at the customs check point. As far as communication between the officer and the appellant was concerned, it was very minimal and most of the time it was communication using sign language and nodding the head rather than speaking in English.

[17] The appellant said that he had informed the customs officer that he wished to go and get his friend, Jimmy, who was supposedly waiting for him outside the airport building. The customs officer purportedly nodded his head indicating his agreement for the appellant to go and get his friend. However, he could not explain why he started running away from the exit of the building until the edge of the car park area. After the appellant went out to get his friend, who could not be located, the appellant returned with PW5, the security officer.

[18] When the appellant returned after his failure to locate Jimmy, he saw that P8 was partially opened. The appellant was handcuffed and taken to another room. P8 was brought to the room later.

[19] The appellant said that the customs officers produced a document bag, P22 which looked similar to the one which he had put in P8 earlier. However, the documents that were in the document bag were missing. The

A appellant denied that the drugs which were in the document bag was his. He said that he has no knowledge of the drugs and certainly it was not his. He denied that P8 and P22 were scanned twice by the customs officers.

[20] The appellant contended that the CCTV footage would support his account of events at the airport. The defence, however, did not call any
B witness.

[21] In the appeal before us, the appellant raised only one issue as his bone of contention, namely, on the failure by the prosecution to adduce the CCTV footage which would support his narrative of what took place at the airport. Hence in this judgment we will only address the point of the failure by the
C prosecution to adduce the CCTV footage of the events that transpired when he went out to search for his friend, Jimmy:

(i) that when he was brought back into the airport building by PW5 after he had gone out from the airport searching for his friend and could not
D locate him, he found that his bag, P8 was partly opened;

(ii) when he went out of the airport building earlier P8 was not closed;

(iii) P8 was not wrapped in blue plastic;

(iv) when he was brought back to the inspection counter, he was handcuffed
E and directed to sit in a separate room. It was only later that P8 together with the contents were brought into the room by a customs officer;

(v) P22 looks similar to his document bag but he claimed that his documents inside P22 were missing; and

F (vi) he denied that P8 was scanned twice as claimed by the prosecution.

[22] The appellant asserted that his story could only be confirmed by the CCTV recording. In light of his narrative of what transpired it is crucial that the CCTV footage be produced by the prosecution to ascertain as to the truth of what was said by the appellant.

G **Findings Of The High Court**

[23] It is the defence of the appellant that if the CCTV footage was adduced in court, it would confirm his version of the story as the truth, namely, it could explain his trolley bag, P8 was not wrapped in blue plastic wrapper, P8 was scanned once, and that he was not brought back to the inspection
H counter after he returned from the parking area.

[24] As to the CCTV footage, the learned JC in his grounds had, *inter alia*, said that:

I [128] In regard to the failure to adduce the CCTV footage in the prosecution's case, I was of the opinion that the evidence of the CCTV footage was merely a supporting evidence in support of the prosecution's case. The failure to tender the CCTV footage could not affect the

prosecution's case in establishing the accused was in possession of the incriminating drugs (contained in P58 (A&B) which were found concealed in P22, where P22 was retrieved from P8. SP4's evidence that P22 was found inside P8 was supported by SP5's testimony. Their testimonies were not discredited.

…

[130] I was of the opinion that there was no necessity for the prosecution to produce the CCTV footage as an additional or corroborative evidence in the prosecution's case. As a matter of fact, SP9 had explained to the Court that the CCTV footage was not helpful in his investigation of the case. As such, he need not adduce the CCTV footage as evidence. Further, the prosecution also need not call any officer from MAB to explain why the footage was not helpful in his investigation. On this score, I could not make any inference which could favour the accused's case on the failure to adduce the CCTV footage in the prosecution's case (see *Mehmet Ucaner Oktay v. PP* [2016] 1 LNS 4; *Ediawe Eshilama Clinton v. PP* [2015] 9 CLJ 169; *Dilbar Nazarova v. PP & Anor Appeal* [2015] 1 LNS 926). I was not satisfied that the CCTV footage could be a material evidence in the prosecution's case in that s. 114(g) of the Evidence Act 1950 should be invoked in the given facts of this case. The analysis here applies both at the close of the prosecution's case and end of the trial.

[25] At the end of the defence case, the learned JC held that the appellant had failed to raise a reasonable doubt on the prosecution's case. The defence also failed to rebut the presumption under s. 37(da) of the DDA. As for the appellant's unsworn statement, the learned JC did not accept the appellant's narrative of events.

Findings Of The Court Of Appeal

[26] The Court of Appeal affirmed the decision of the learned JC. The Court of Appeal held, *inter alia*, that:

(i) the CCTV footage, if clear, would only serve as an additional corroborative evidence to the prosecution;

(ii) the CCTV footage would only strengthen the prosecution's case if it was produced;

(iii) the failure on the part of the prosecution to disclose and deliver the CCTV footage was not fatal to the case of the prosecution; and

(iv) the High Court's order of conviction and sentence was affirmed.

Before The Federal Court

Submission By The Appellant

[27] The appellant contended that both the High Court and the Court of Appeal had erred in failing to find that the prosecution was in breach of s. 51A(1)(b) of the Criminal Procedure Code ("CPC") when it failed to

A disclose or produce the relevant CCTV footage, recording the events at the airport on 21 July 2013. As a result, the appellant's right to a fair trial has been denied.

[28] The appellant contended that the drugs were not in his black document bag when he came through customs, as the document bag which was
B produced in court as P22 was not his. Hence, the CCTV footage is a relevant and crucial piece of evidence for the defence.

[29] When PW9 was cross examined, he confirmed that he had seen the CCTV footage on the events of 25 July 2013, however he claimed that the
C footage was not clear.

[30] The appellant contended that the learned JC made findings against the appellant without viewing the CCTV footage and this has caused prejudice to the appellant. The appellant lost the opportunity to view the CCTV footage and thus he has been denied the right to natural justice *vis-à-vis* the
D denial of a fair trial.

[31] It is submitted by the appellant that the prosecution was under an obligation under s. 51A(1)(b) of the CPC to produce the CCTV footage once PW9 had made reference to it under cross-examination. The obligation was said to be a continuing one.

E **[32]** The appellant submitted that cl. (1) of art. 5 of the Federal Constitution ('FC') guarantees the right to life and personal liberty to a person. The right to life and personal liberty can only be deprived "save in accordance with law". The words "save in accordance with law" include the rights to a fair trial in both procedure and substance (refer to *Shamim Reza*
F *Abdul Samad v. PP* [2009] 6 CLJ 93; [2011] 1 MLJ 471; and *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301).

[33] It is further submitted that cl. (1) of art. 5 and art. 8 of the FC respectively and s. 51A of the CPC placed an implied obligation upon the
G prosecution to make a fair disclosure as long as the trial is still ongoing. The appellant referred to *Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1 where the Indian Supreme Court held that a wide duty of disclosure exist as part of a constitutional right to a fair trial:

> The liberty of an accused cannot be interfered with except under due
H process of law. The expression "due process of law" shall deem to include fairness in trial. The court (*sic* "Code") gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused places an implied obligation upon the prosecution (prosecution and prosecutor)
I to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in Court or not. That document should essentially be

> furnished to the accused and even in the cases where during investigation a document is *bona fide* obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

[34] Hence, given that the appellant in the present case has the right to a fair trial, the issue is whether the prosecution has breached that right by the non-disclosure of the CCTV footage under s. 51A of the CPC.

[35] Counsel for the appellant referred to authorities from various jurisdictions which demonstrate the wide duty of disclosure which exists as part of a constitutional right to a fair trial. Amongst them are Indian authorities of *Manu Sharma v. State (NCT of Delhi)* (*supra*) at para. 218; *Shiv Kumar v. Hukam Chand* [1999] 7 SCC 467 at para. 13; *VK Sasikala v. State* [2012] 9 SCC 771 at para. 21; Australian authorities of *R v. Easterday* [2003] 143 A Crim R 154 at p. 188; *Ragg v. Magistrates' Court of Victoria* [2008] 179 A Crim R 568 at p. 589; Canadian authorities of *R v. Stinchcombe* [1991] 3 SCR 326 at p. 336, South African case of *Shabala and Others v. Attorney General of the Transvaal and Another* [1996] 1 LRC 207 at p. 226. Not to mention authorities from our own jurisdiction in *See Kek Chuan v. PP* [2013] 6 CLJ 98 and *Luke Nnaemeka Ugwu lwn. PP* [2016] 2 CLJ 400 at p. 408 which had affirmed and applied the equality of arms principle. The right of equality before the courts was stated in the Supreme Court of Australia in *Ragg v. Magistrates' Court of Victoria* (*supra*):

> The right to equality before the courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.

[36] The appellant submitted that the principle of equality of arms is crucial to the fundamental rights of an accused under cl. (1) of art. 5 and cl. (1) of art. 8 of the FC. This is consistent with domestic law.

[37] Hence it was submitted by the appellant, that contrary to the observation made by the Court of Appeal, the learned JC was in breach of s. 51A(1)(b) of the CPC when it failed to produce to the appellant during the High Court proceedings, the CCTV footage.

[38] The appellant also referred to *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; [2009] 8 MLJ 579 where it was held that under s. 51A of the CPC the prosecution owes a general duty to deliver certain documents which may assist the appellant in his defence. Section 51A of the CPC has been described as having been "designed to ensure that there is a fair system for the disclosure, especially of unused material which may assist the defence in the timely preparation and presentation of its case and enables the court to focus on all the important issues in the trial so that the trial will not be halted or delayed".

Submission By The Respondent

[39] The respondent submitted that the prosecution has never breached the right to a fair trial by the non-disclosure of the CCTV footage under s. 51A of the CPC mainly on the following reasons:

(i) there is no duty for the prosecution to deliver the CCTV footage before the commencement of trial under s. 51A(1)(b) of the CPC because the prosecution did not tender the said CCTV footage as exhibit to form part of the prosecution's evidence; and

(ii) there is no evidence that the said CCTV footage was in the appellant's favor and thus there is no duty on the prosecution to disclose the same as facts favorable to the accused under s. 51A(1)(c) of the CPC.

Our Findings

[40] Section 51A of the CPC provides:

> (1) The prosecution **shall** before the commencement of the trial deliver to the accused the following **documents**:
>
> (a) A **copy of the information made under section 107** relating to the commission of the offence to which the accused is charged, if any;
>
> (b) A **copy of any document** which would be tendered as part of the evidence for the prosecution; and
>
> (c) A **written statement of facts favourable to the defence** of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.
>
> (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.
>
> (3) A document shall not be inadmissible in evidence merely because of non-compliance with subsection (1).
>
> (4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was so done deliberately and in bad faith.
>
> (5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused:
>
> (a) A reasonable time to examine the document; and
>
> (b) To recall or re-summon and examine any witness in relation to the document. (emphasis added)

The Effect Of The Word "Shall" In s. 51A(1) CPC

[41] The crucial issue for consideration hinges on the effect to be given to the word "shall" as appearing in s. 51A(1) of the CPC. Is the court obliged to construe the word "shall" as mandatory in this case.

[42] The court has the occasion to consider on the significance and effect of the word "shall" in *PP v. Goh Thor Kiah* [1952] 1 LNS 85; [1952] 1 MLJ 91. The respondent was charged with possession of 20 packets of opium. He pleaded guilty and was discharged under s. 173A of the CPC. When the appeal came before Taylor J, no notice of an appeal had been served on the respondent. The Public Prosecutor applied under s. 314(2) of the CPC for a notice to be issued; this was done and it was returned unserved. Section 314(2) reads:

> (2) If the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence.

The prosecution applied under the said section for the appeal to be heard on its merits in the absence of the respondent and suggested that a more severe sentence should be passed and a warrant issued to enforce it. Taylor J in his judgment said that:

> I think the explanation of the section is this. Originally there was no appeal by the Public Prosecutor; the chapter was framed on the view that he would be the respondent and provision is made for the record to be transmitted to him by way of service but without being actually served. Much later, the Code was amended to permit of an appeal on the merits by the Public Prosecutor but section 314 was not amended. I agree that it is a strong thing to construe the word "shall" as "may" but I do not go as far as that. In my opinion, having regard to what I believe to be the history of the section, the true construction is: "shall" if the prosecutor is the respondent." I do not think that the word "shall", in a procedural statute, could be construed as strictly as is here contended if the consequence is violation of a fundamental principle; I think that on the true principles of construction of statutes the word "shall" must be given a meaning modified to the extent which I have indicated.

Taylor J held that the word "shall" should not be construed as mandatory as such a construction is plain violation of the fundamental principle *audi alteram partem* and is wholly opposed to all principles of judicial procedure.

[43] The Supreme Court case in *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360 provides a useful guideline in ascertaining whether the word "shall" provided in a provision is to be construed as mandatory. It was held that it largely depends on the intention of the Legislature, the facts and circumstances of the case and also the injustice that it would bring in interpreting the provision in a certain way. It was in relation to s. 158(2) of the CPC. The Supreme Court held that:

> The question that arises is whether section 158(2) is mandatory or directory. In our view, the word "shall" appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such

A provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way of the other (see *Interpretation of Statutes*, 7th Ed., p 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and
B decide in that order whether the matter is imperative or only directory (see *Howard v. Bodington* (1877) 2 P.D. 203 at p 211).

Applying the test to the facts and surrounding circumstances of the case, we hold that in so far as this case is concerned, the provision of section 158(ii) is not imperative but directory. The provisions contained therein
C only lay down a rule of procedure and do not relate to the mode of trial.

[44] This court had interpreted the word "shall" in O. 42 r. 12 of the Rules of the High Court 1980 as not intended to be so, in the case of *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156. Order 42 r. 12 of the Rules of the High Court 1980 provides:

D 12. Every judgment debt shall carry interest at the rate of 8 percentum per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

The court held that:

E Although the Order is expressed in imperative "shall", it is certainly not intended to be so; because to give effect would be incompatible with the discretionary power of the court to order interest under section 11 of the Civil Law Act 1956. We do not think that Order 42 rule 12 can override the provision of the Act. This Order can only mean that the court may
F order interest at 8% if the court thinks that circumstances justify such rate. In no sense must this Order be understood as obliging the court to award interest at 8% and 8% only. We cannot therefore accept the submission of counsel for the respondent and as such the award of interest by the learned judge is upheld.

G **[45]** Similarly in *Rossarin Nuekaew v. PP* [2017] 8 CLJ 503 this court held that the imperative "shall" in s. 402B of the CPC is only directory and its non-compliance is a mere irregularity and not an illegality and therefore curable under s. 422 of the CPC. Zulkefli Ahmad Makinudin PCA speaking for the Federal Court said that:

H [25] Applying the test and the principle laid down in *Hee Nyuk Fook*, it is our judgment that the requirement to read aloud the witness statement under subsection 402B(6) of the CPC is only directory and not mandatory.

[46] Applying the principles as enunciated in the aforesaid cases, whether
I the word "shall" in a particular legislation is mandatory or directory depends upon the intention of the Legislature in question which is ascertained by looking at the whole scope of the statute to be construed. The use of the word

"shall" would not by itself make a provision of the Act mandatory. It is to be construed with reference to the scheme of the statute and the context in which it is used. In *Cheong Seok Leng v. PP* [1988] 1 LNS 39; [1988] 2 MLJ 481 at p. 489 (MLJ) (tab 6), Chan Sek Keong JC (as he then was) explained the relevant rules of interpretation to be given to the word "shall" which appears in legislations as follows:

> I now turn to the wording of section 23(1) of the Interpretation Act. Structurally, it is in two parts. The first part provides that "subsidiary legislation … shall, unless it be otherwise provided … be published in the *Gazette*". Ignoring for the time being the effect of the qualifying clause, the effect of which I shall discuss later, the use of the word "shall" in a statute to qualify a thing to be done indicates the *prima facie* intention of the legislature that it must be done, i.e. it is mandatory. **However, it is not conclusive in every case. In the appropriate context, it may be directory. Whether or not it is mandatory or directory depends on the legislative intent**. How does court ascertain the legislative intent in such a case? The relevant rules of interpretation applicable to an enactment which is mandatory in form have been summarized succinctly by Subba Rao J in *State of U.P. v. Babu Ram AIR* [1961] SC 751 at p 765 as follows:
>
> > (29) The relevant rules of interpretation may be briefly stated thus: when a statute uses the word 'shall', *prima facie* it is mandatory, but the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the legislature the court may consider, *inter alia*, the nature or design of the statute, and the consequences which would follow from construing it one way or another, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and above all, whether the object of the legislation will be defeated or furthered. (emphasis added)

[47] On the scheme of the statute itself (the CPC), it is apposite to note that the said provision in the statute was intended to avoid any unnecessary postponement and delay in a trial, when the defence in a criminal trial seek for postponement purportedly premised on the non-receipt of documents which is crucial and necessary in the preparation for the defence of the accused. The provision was never meant to impede the prosecutorial process so as to render inadmissible the tendering of any document which did not comply with s. 51A of the CPC.

[48] The purposive rule of interpretation must be adopted in interpreting s. 51A of the CPC, pursuant to s. 17A of the Interpretation Acts 1948 and 1967 which read as follows:

> Regard to be had to the purpose of Act
>
> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[49] It is clearly untenable in this case to allude to the word "shall" as mandatory, thus stultifying the justice of case, when a document was not delivered to the accused persons before the commencement of the trial.

[50] The scheme of the provision denotes that s. 51A of the CPC is fundamentally a procedural provision as opposed to a substantive or evidential provision of the law. The scheme of the Act was explained by the Minister when moving in Parliament for s. 51A to be included in the CPC. It was explained that s. 51A is merely procedural in nature (refer to *PP v. Mohd Fazil Awaludin* (*supra*), at p. 876 wherein the learned judge referred to the speech of the Minister concerned) wherein the intention of its inclusion was to facilitate the speedy disposal of trials without the hassle of trials being postponed due to documents (namely, first information reports, documents which would be tendered as part of the prosecution's case written statements favourable to the accused persons) not being supplied to accused persons before commencement of trials in criminal cases.

[51] In this regard, it is pertinent to note that s. 51A of the CPC is not concerned with admissibility issues unlike other sections in the CPC for eg, s. 402A of the CPC. For comparison, it is useful to refer to s. 402A of the CPC which stipulates that:

> 402A Notice to be given of defence of alibi
>
> (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused **shall** have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial.
>
> (2) … (emphasis added)

Under s. 402A of the CPC, the word used is "shall have given notice …" failure in which, renders the evidence in support of the defence of alibi inadmissible.

[52] Coming back to s. 51A of the CPC, if the Legislature was of the view that non-compliance with s. 51A of the CPC would affect the admissibility of any evidence, it would have been worded in a similar or like manner as s. 402A of the CPC.

[53] Instead, Parliament sees it fit to add new sub-ss. (3), (4) and (5) to s. 51A of the CPC to give discretionary power for the trial court to admit or exclude any document delivered after the commencement of trial.

[54] The concern of s. 51A of the CPC appears to be with service and delivery of documents and not with admissibility of evidence. Such being the case, the word "shall" must be construed, in all circumstances of the case to enable and to assist in the administration of justice rather than to impede it. To construe the word '"shall" as mandatory in this case would be absurd, as the non-compliance with s. 51A of the CPC would vitiate a trial and would result in allowing a guilty person to be set free. Further, there is recourse or contingency provided in the said section in the event s. 51A of the CPC is not complied with as provided under s. 51A(3) of the same.

[55] Hence, a more liberal meaning must be given to the word "shall" in s. 51A of the CPC rather than a rigid interpretation, so as not to curtail the administration of justice in the manner of a case to be carried out.

Whether The Non-disclosure Of CCTV Infringed The Principle Of Right To A Fair Trial

[56] Reverting back to the complaint by the appellant that the prosecution was under an obligation to produce the CCTV footage once PW9 had made reference to the same under cross-examination. The appellant submitted that this duty of disclosure is a continuing duty.

[57] We do not see the merits of such contention for the following reasons: Section 51A(1)(b) of the CPC provides that "The prosecution shall before the commencement of the trial deliver to the accused … a copy of any document which would be tendered as part of the evidence for the prosecution; and".

[58] The CCTV footage was never tendered as prosecution's exhibit as forming part of the prosecution's case, simply because the footage was not clear and would be of no assistance to the prosecution's case. This can be found in the testimony of the investigation officer ("PW9") at p. 144, jilid 3. Hence, it is understandable why the CCTV footage has never been intended to be part of the prosecution's exhibits or evidence, and thus, there is no duty on part of the prosecution to deliver such CCTV footage to the appellant before the commencement of trial under s. 51A(1)(b) of the CPC.

[59] If the CCTV was unclear and unable to assist the prosecution's case, how could it assist the defence case. Therefore, it cannot be said that the CCTV footage would be evidence favorable to the defence case.

[60] It was submitted by the appellant that by failing to produce the CCTV footage after PW9 had made reference to the same during the trial, the appellant was irreparably prejudiced. Instead, PW9 had made the decision that the CCTV footage was unclear and therefore it was irrelevant. It was also

A submitted that although the prosecution is of the opinion that the particular evidence is unnecessary to their case, but it is an entirely different decision-making process from deciding whether to disclose that evidence to the defence. For this the appellant referred to the case of *R v. H* [2004] 2 AC 134 whereby Lord Bingham stated:

B

> Fairness ordinarily requires that any material held by the prosecution, which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. **Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure.** The golden rule is that full disclosure of such material should be made.
>
> (emphasis added)

C

[61] We are of the view that, to apply lock, stock and barrel what was said by Lord Bingham in the context of our case is misconceived. Lord Bingham was referring to "withholding of evidence from disclosure". From the facts of our present case, there is no basis to say that the prosecution has withheld or suppressed the evidence of the CCTV footage because:

D

(i) there was no dispute or challenge on the evidence of PW9 that the CCTV footage was unclear, and as such, this evidence was deemed accepted; and

E

(ii) there was also no suggestion by the appellant to PW9 that any exculpatory and material evidence which are favorable to the defence of the appellant were withheld or suppressed by the prosecution in this CCTV footage by the prosecution.

F Due to the fact that there was no basis to say that the prosecution was suppressing or withholding material evidence, adverse inference under s. 114(g) of the Evidence Act 1950 could not be invoked against the prosecution.

[62] In addition, the appellant was never prohibited from applying to court G for the CCTV footage to be produced or tendered in court or that for the defence to inspect the CCTV footage, after the prosecution had disclosed the existence of the same in the evidence of PW9 during cross-examination. This was admitted by counsel for the appellant that there was no such application by the defence during the trial. Such omission on the part of the appellant constitutes a waiver on his right to such evidence and consequently, he could H not complain subsequently that his right of fair trial has been denied.

The Ambit Of The Duty Of Disclosure By The PP Under s. 51A(1)(b) of the CPC

[63] The duty on the prosecution to serve documents to the defence before commencement of the trial is circumscribed within s. 51A of the CPC. It I provides for automatic discovery of certain documents by the accused person before the commencement of the trial.

[64] Section 51A(1)(b) of the CPC, which is the specific provision relied upon by the appellant, provides for the delivery to the accused person of a copy of **any document** which would be tendered as part of the evidence for the prosecution. Section 51A(1)(c) requires the Public Prosecutor to deliver to the accused a written statement of facts favourable to the defence of the accused. The wording of s. 51A is explicit as to what the prosecution is required to supply, namely those documents/statements of fact expressly stipulated therein. The Court of Appeal decision in *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331 has dealt with this issue when it said: (emphasis added)

> [57] Learned counsel for the respondent submitted that the learned judge erred in fact and in law in not allowing the application for the production of the original samples and swabs:
>
> (a) when it would prejudice the respondent's right to a fair trial;
>
> (b) when s. 51(A)(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering at trial;
>
> (c) when he failed to take into account that the authenticity of the samples were doubtful and questionable because of tampering by the police.
>
> [58] It was our view that the decision of the learned judge in respect of the original samples and swabs was correct in law as the respondent was not entitled at the pre-trial stage to have the original samples and swabs. With respect to the learned judge's order relating to the slides and pictures we were of the view that the learned judge erred in law in making the order. (See *Raymond Chia* case). **Furthermore the respondent, in our view, should not be allowed to fish out for information. (Sohoni's Code of Criminal Procedure, 1973**).
>
> [59] **With regard to the respondent's contention that s. 51A(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering our answer to that is that s. 51A refers to documents only**.
>
> (emphasis added)

[65] The decision by the Court of Appeal was affirmed by the Federal Court in the case of *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265 wherein Abdull Hamid Embong FCJ (as His Lordship was then) said as follows:

> [50] At the close of arguments, learned assisting counsel for the appellant, Dato Param Cumaraswamy, called our attention to a document called the "General Comment No. 32 of the UN Human Rights Committee, 19th Session". *We were reminded of the rights to equality before the courts and to a person's right to a fair trial. One feature found in that document is the provision on "adequate facilities" to be given to an accused person. This includes access to documents and other evidence, including materials that the prosecution "plans to offer in court against the accused".* (see *para 33*).
>
> ...

A [52] *Now, the words "plans to offer in court against the accused" which we underscored above have, we think, been put in place when Parliament added s. 51A to the CPC. We need to repeat here s. 51A(1)(b) which says:*

(1) *The prosecution shall before the commencement of the trial deliver to the accused*:

B (b) *A copy of any document which would be tendered as part of the evidence of the prosecution*;

In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the General Remarks document of the Hunan Rights Committee that was read to us. Section 51A CPC has, in our opinion, made
C *the battlefield more level, to preserve the "equality of arms principle", ensure the fairness of a trial and ultimately uphold the very integrity of the courts in its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.* (emphasis added)

D

[66] Section 51A of the CPC expressly provides for the disclosure of First Information Report, documents or reports which the prosecution intends to tender at trial and the statement of fact favourable to the defence only, subject to public interest exception. It is an automatic disclosure by the prosecution only to these three types of "documents" as compared to s. 51 of the CPC
E which provides the discovery upon request. Hence, the CCTV footage does not fall within the ambit of "documents" as envisaged under s. 51A(1)(b) of the CPC. This was precisely what was decided in *PP v. Datuk Seri Anwar Ibrahim & Another Appeal* in that the Court of Appeal held that the exercise of the discretionary power by the court under s. 51 of the CPC with regard
F to the application at the pre-trial stage has been limited. The court construed the section strictly. Except as what is provided for under s. 51A of the CPC the accused is not entitled to discover or inspect evidence or material in the possession of the prosecution before the commencement of the trial. This decision of the Court of Appeal was affirmed by this court.

G **[67]** The other issue is with regards to the distinction between the provisions which prescribed the manner of the trial, such as ss. 399 and 402A of the CPC and the provisions which facilitate the conduct of the trial such as s. 51A of the CPC. Disregard of the former is fatal to the trial and would at once invalidate the conviction. However, disregard of the latter is not fatal
H unless the court is satisfied that the accused had been prejudiced. The non-compliance with s. 51A of the CPC would not statutorily prevent the prosecution from tendering the documents which were not delivered to the accused person before trial as evidence in the course of the trial. Hence it is only procedural and not evidential. It is trite law that even in cases of
I evidence obtained illegally, its admissibility is unaffected as the issue is actually relevancy. This was explained by Lord Goddard in the Privy Council case of *Kuruma v. The Queen* [1955] AC 197:

> the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence is obtained.

[68] NS Bindra in his book "*Interpretation of Statutes*" at p. 582 explicitly explained the function of the rules of procedure:

> Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and not hurdles to obstruct pathway to justice. Construction of the rule of procedure which promotes justice and prevents its miscarriage by enabling the court to do justice in myriad situations, all of which cannot be envisaged, acting within the limits of permissible construction must be preferred to that which is rigid and negatives the ends of justice. The reason is obvious. Procedure is means to subserve and not rule the cause of justice. A rule of procedure enacted in a statute must, moreover, be liberally construed: so as to lead to the smooth working of the scheme of the statute. It is a general rule relating to the construction of statute that in the absence of an express provision, an adjective law cannot control the provisions of substantive law.

Reference To Case Laws From Other Jurisdictions

[69] Counsel for the appellant had referred to case laws from other jurisdictions to fortify his argument on the duty of the prosecution to produce the CCTV footage once PW9 made reference to it and also to disclose the same to the defence.

[70] We are of the view that it is not necessary to refer to other jurisdictions because:

(i) there is no *lacunae* in the CPC, there is specific provision on disclosure in criminal trials in the CPC, namely ss. 51 and 51A; and

(ii) our law in this respect is not *in pari materia* with the jurisdictions referred to by counsel of the appellant.

[71] In fact, caution should be exercised in importing common law/laws from other countries where the domestic legislation clearly provided for it. Abdul Hamid Mohamad JCA in *Raphael Pura v. Insas Bhd & Ors* [2003] 1 CLJ 61 at p. 88 said that:

> In my view, this court is bound by the provisions of our own Rules and not that of any other country …
>
> Furthermore, this court should be careful and slow to adopt the decisions of the courts in other countries, even on the basis that it forms part of the common law of England, which on this point, it is not. Particular attention must be paid to the written law of this country. In other words, the provisions of s. 3(1) of the Civil Law Act 1956, must be borne in mind.

[72] Further His Lordship said in *Robert Lee & Anor v. Wong Ah Yap & Anor* [2007] 4 CLJ 1 that:

> It is true that the courts, through its decisions try to arrive at a "fair and just" result. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice.

Conclusion

[73] Given the aforesaid, there is no merit in the contention of the appellant that the failure of the prosecution to disclose the CCTV footage had caused irreparable prejudice to the appellant and had denied the appellant's right to a fair trial which is a fundamental right under cl. (1) of art. 5 and cl. (1) of art. 8 of the FC.

[74] The learned JC had evaluated the issue on the failure to adduce CCTV footage in his judgment at pp. 43 to 45 Jilid 2 and made findings of fact regarding the issue that CCTV was not material evidence and refused to invoke adverse inference under s. 114(g) of the Evidence Act 1950. His decision was affirmed by the Court of Appeal.

[75] Therefore, we are of the view that there is no appealable error shown by the appellant as to the decision of the learned JC which was affirmed by the Court of Appeal which warrants our intervention. We therefore affirm the conviction and sentence under s. 39B of the DDA. The appeal is accordingly dismissed.

[76] My learned brother and sister judges in the panel (save and except for Nallini Pathmanathan FCJ) have read this judgment and have expressed their agreement to it, to form the majority judgment of this court.